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No. 82-1724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

—v.—

ROBERT UPLINGER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN ASSOCIATION FOR PERSONAL PRIVACY, THE SEX INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS), THE COALITION ON SEXUALITY AND DISABILITY, AND THE SOCIETY FOR THE SCIENTIFIC STUDY OF SEX

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The undersigned, as counsel for the American Association for Personal Privacy, the Sex Information and Education Council of the United States (SIECUS), the Coalition on Sexuality and Disability, and the Society for the Scientific Study of Sex, respectfully

moves this Court for leave to file the accompanying brief amici curiae.

Amici organizations have all been actively involved in bringing contemporary research on sexuality to bear on the articulation and effectuation of the fundamental right of consenting adults to autonomy in sexual expression, believing that freedom and rationality in choosing sexual relations in one's own personal way is a basic human good and the indispensable moral condition of a mature and responsible personal life. Amici organizations support the right of consenting adults to sexual autonomy in their personal lives, and the elaboration, dissemination, and development of sexual knowledge and supportive professional care adequate to the responsible exercise of this basic human right. Amici believe that People v. Onofre, 51 N.Y.2d 476 (1980), cert. den. 451 U.S. 987 (1981) is a correct recognition of this basic human right as an aspect of the fundamental constitutional right to privacy, and are concerned that the validity and importance of this right be given proper weight in the judicial consideration of correlative rights of solicitation. They join here so to argue.

THE AMERICAN ASSOCIATION FOR PERSONAL PRIVACY (AAPP) is a non-profit California corporation that promotes education within the legal professional regarding the right to privacy and, particularly, its application to sexual civil liberties. One of its founders, Professor Walter E. Barnett, wrote the seminal study of sexual civil liberties, Sexual Freedom and the Constitution, University of New Mexico Press: Albuquerque, 1973; and the AAPP's educational functions have included publication of the Sexual Law Reporter from 1974 to 1980. The nationwide membership of the AAPP, chosen on an invitational basis of professional achievement, includes, in its committees, scholars and practitioners in the fields of law, history, sociology, psychology, and theology. The AAPP, through its committees and members, has participated in a number of cases in various areas as follows: challenges to fornication laws: State v. Saunders, 1977, 75 N.J. 200, 381 A.2d 333; challenges to sodomy laws involving private conduct between persons above the age of consent: Buchanan v. Batchelor (N.D. Texas 1970) 308 F. Supp. 729, rev. on procedural grounds, Wade v. Buchanan, 1971, 401 U.S. 989; Commonwealth v. Bonadio, 1980, 490 Pa. 91, 415

A.2d 47; People v. Onofre, 1980, 51 N.Y.2d 476, 415 N.E.2d 936 cert. den. 451 U.S. 987 (1981); attacks on state solicitation laws involving noncommercial sexual solicitations: Pryor v. Municipal Court, 1979, 25 Cal.3d 238; State v. Phipps, 1979, 58 Ohio State 2d 271, 389 N.E.2d 1128; State v. Tusek (Oregon App. 1981), 630 P.2d 892; Commonwealth v. Sefranka (Mass. 1980), 414 N.E.2d 602; challenges to loitering laws: People v. Gibson, 1974, 184 Colo. 444, 521 P.2d 774; People v. Ledenbach, 1976, 61 Cal. App.3d, Supp. 2; and attacks on employment discrimination on grounds of sexual orientation: Gay Student Services v. Texas A & M (5th Cir. 1980), 612 F.2d 160; Gay Law Students Association v. Pacific Telephone, 1979, 25 Cal.3d 458.

THE SEX INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS), affiliated with the Department of Health Education of the School of Education, Health, Nursing and Arts Professions of New York University, is a voluntary health organization which, since its founding in 1964, has publicly affirmed its belief that freedom to exercise sexual choice is a fundamental human right; that such freedom of sexual choice carries with it responsibility to self and others; and that these

responsibilities call for acquiring knowledge and developing a personal ethical code. As a clearinghouse for authoritative sexual information for professionals of all disciplines and people of every age, SIECUS provides an information service based on an extensive collection of resource books, journals, and other material in the field of sexuality. At present, its professional staff responds to over 5000 inquiries annually. Its professional publication, The SIECUS Report, continually reviews new research, books and materials, and its publications for the lay public have translated what is known to be true about human sexual behavior into commonly understood language. Thus, SIECUS is in a position to both understand and interpret the growing knowledge base on human sexuality, as well as be aware of the concerns of both professionals and the public at large through responding to inquiries. SIECUS joins this brief in order to assure that certain social and psychological factors connected with this issue are properly before the Court.

THE COALITION ON SEXUALITY AND DISABILITY, INC. is a network of people, both disabled and able bodied, professionals and consumers of services, committed to education

and advocacy in assisting citizens with disabilities achieve full integration into society with confidence in their sexuality. The organization grew out of the identified need of people with disabilities to gain accurate, accessible, and appropriate sexual health services. The Coalition's scope of concern essentially includes the sexual well-being of women and men with chronic illnesses and physical disabilities. For example, an estimated 50% of the 11 million diabetics in this country experience sexual dysfunction related to their disease; anti-hypertensive medications are a leading cause of sexual dysfunction for 35 million Americans with high blood pressure; and sexual dysfunction is associated with diseases of the prostate, arthritis, multiple sclerosis, kidney disease, spinal cord injury as well as numerous drugs for the treatment of health problems. Sex education and counseling help individuals learn the available options for sexual satisfaction from which they may choose behaviors that suit their needs, beliefs and values. The Coalition joins this brief in opposition to state restrictions that limit the individual's right to learn, to adapt, and to enjoy loving rela-

tionships as an expression of a healthy sexuality.

THE SOCIETY FOR THE SCIENTIFIC STUDY OF SEX, now in its twenty-seventh year, is an international professional association of researchers, clinicians and educators who share an interest and competency in the scientific pursuit of knowledge concerning sexuality. The Society supports the study of sexuality as a valid area for research and promotes interdisciplinary cooperation among professionals committed to the scientific study of sexuality through publication of The Journal of Sex Research and The Society Newsletter, the maintenance of membership directories and judicial resource files, and the sponsorship of both regional and national meetings annually of leaders in the field of sex research. The Society's activities span the range of disciplines represented by its members, conference participants, and journal authors. The contributions of and dialogue between biologists, nurses, therapists, phychologists, sociologists, anthropologists, historians, physicians, educators and theologians insure a broad interdisciplinary approach to the investigation of human sexuality. Since 1957, when the Society was found-

ed, it has been committed to the principle that views about sexuality, previously based largely on speculation, must now receive the benefit of rigorous and systematic empirical investigation. The Society joins this brief as an application of this principle to law: advances in the scientific knowledge of sexuality must, above all, replace the unscientific forms of speculation which can no longer defensibly be urged in defense of coercive restrictions on responsible sexual freedom.

Counsel has sought the consent of the parties to file this brief amici curiae. Counsel for respondent, Robert Uplinger, has consented; counsel for petitioner has denied this request.

Respectfully submitted,

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This brief is submitted by the undersigned amici curiae conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of Amici

The interest of the amici is set forth in the attached motion for leave to file.

Summary of Argument

Amici address this brief to one issue: the justifiability of the ruling of the New York Court of Appeals in People v. Onofre, 51 N.Y.2d 476 (1980), cert. den. 451 U.S. 987 (1981), that decisions by adults to engage in private consensual sexual activity are protected by the constitutional right to privacy. The decision of the Court of Appeals in State v. Uplinger, 58 N.Y.2d 936 (1983), on writ of certiorari in the Supreme Court here, is based on its previous decision in Onofre. Accordingly, the interpretation of the constitutional argument in Onofre must importantly shape the cognate argument in Uplinger. For example, if, as amici believe and will argue herein, Onofre properly rests on the dignity of a fundamental constitutional right, the considerations of constitutional neutrality, central to Uplinger, must be reinforced.[1]

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[1] The Supreme Court's usual first amendment concern that regulations of speech be content neutral is, if anything, heightened by regulations of speech communicating information

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> The Supreme Court has stated that:
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> "...the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," Carey v. Population Services, 431 U.S. 688 at n. 5 (1977).

The Court's summary affirmance without opinion of Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D.Va. 1975), aff'd without opinion 425 U.S. 901 (1976), accordingly, leaves this question unresolved. Cf. Onofre, cert. den. 451 U.S. 987 (1981).[2] Such controversial questions, as much about the legitimacy as the application of the constitutional right to privacy, have characterized discussion of the right since Griswold v. Connecticut, 381 U.S. 479 (1965) and its later elabo-

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(footnote continued from previous page) relevant to the exercise of the constitutional right to privacy, for content neutrality may here protect, as well, against hostile prejudice against exercise of fundamental rights. See Bigelow v. Virginia, 421 U.S. 809 (1975).

[2] Amici subscribe to the fuller discussion of this point by Judge Buckmeyer in Baker v. Wade, 553 F. Supp. 1121, 1135-1140 (N.D.Tex. 1982).

rations.[3] Amici submit that Onofre correctly resolves this further "difficult question" (431 U.S. 688 at n. 5) of application consistent with the most coherent, sensible, and just reading of the case law and a sound defense of the historical and interpretive legitimacy of the Court's elaboration of this right.

In brief, the right to constitutional privacy is a coherent elaboration of a historically entrenched, abstract background right of voluntary association, a right of the person associated in the first amendment with religious, political, and ideological associations, but clearly understood by the Founders to apply to intimate associations like marriage as well. Accordingly, consistent with the Court's traditional role in elaborating abstract background rights, the right to constitutional privacy has properly been developed to protect aspects of decisions regarding intimate associations. Onofre coherently elaborates this right to encompass persons' decisions regarding forms of sexual expression in their intimate relations.

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[3] Consider, for example, J. H. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L.J. 920 (1973).

Coercive prohibitions, which compromise this underlying fundamental right, can be justified if they satisfy a constitutionally required burden of argument of protecting relevant equal rights of adult persons to neutral goods of life, bodily integrity, security, and the like and the rights of children to developmentally appropriate care and nurturance. This burden cannot be satisfied by forms of argument, which, on constitutionally reflective examination, do not protect the equal rights of persons to neutral goods, but represent the kinds of ultimate disagreements about values and ways of living among which central constitutional values of toleration command state neutrality. Statutes, of the kind struck down in Onofre, cannot satisfy the constitutional burden of argument required for coercive abridgement of fundamental rights. Rather, these statutes work constitutionally unjust and degrading harms to persons in precisely the ways that the right to constitutional privacy forbids.

ARGUMENT

I.

THE ABSTRACT BACKGROUND RIGHT, WHICH THE CONSTITUTIONAL RIGHT TO PRIVACY ELABORATES, ENCOMPASSES THE INDEPENDENT DECISIONS OF PERSONS REGARDING THE FORMS OF SEXUAL EXPRESSION CENTRAL TO THE INTEGRITY OF THEIR INTIMATE RELATIONSHIPS.

Controversy over the nature, provenance, and application of the constitutional right to privacy has followed in the wake of each of the Supreme Court's decisions extending the right: to the use of contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); to the use of obscene materials in the privacy of one's home, Stanley v. Georgia, 394 U.S. 557 (1969); and to the use of abortion services, Roe v. Wade, 410 U.S. 113 (1973). Amici submit that the most coherent and just interpretation of this case law converges with a sound defense of the historical and interpretive legitimacy, indeed necessity, of the elaboration of the right.

The maintenance of a continuous yet vital constitutional tradition in the United States has required the Supreme Court often to interpret relevant constitutional text in terms of

abstract background rights (equal liberties of religion or speech, equal treatment, cruel and unusual punishment, etc.).[4] Continuity is insured by the common appeal to an abstract intention in different historical periods; vitality, by the Court's duty reasonably to articulate changes in the scope of application of the common concept in light of each generation's best arguments and experience about what should count as basic liberties of the person,[5] or the demands of equality,[6] or

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[4] One useful way of putting this point is to note the way in which constitutional interpretation in the United States over time appeals to a stable concept (of fairness, for example), but each constitutional generation articulates a different conception of the underlying concept. See R. M. Dworkin, Taking Rights Seriously, Harvard University Press: Cambridge, Mass., 1977, at pp. 134-136.

[5] For example, the generation which approved the free speech clause of the first amendment would almost certainly not have applied it to seditious libel prosecutions. See Leonard W. Levy, Legacy of Suppression, Harvard University Press: Cambridge, Mass., 1964. Yet, contemporary case law quite properly views such prosecutions as at the core of the prohibitions of the free speech clause. See New York Times v. Sullivan, 376 U.S. 254 (1964).

[6] The contemporary constitutional conception of equal protection clearly interprets the

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unjustly disproportionate punishment.[7]

The constitutional right to privacy was elaborated by the Supreme Court consistent with this traditional approach to its interpretive task. There is a powerful historical argument that the generation who drafted and approved the Constitution and Bill of Rights thought of these documents as protecting not only enumerated rights, but unenumerated basic human rights as well.[8] There can be little

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idea more expansively than the conception of previous generations. See Brown v. Board of Education, 347 U.S. 483 (1954); Frontiero v. Richardson, 411 U.S. 677 (1973).

[7] See, for example, Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976).

[8] For example, the leading academic critic of the constitutional right to privacy, John Hart Ely, expressly denies that either textual or historical argument belies the legitimacy of the Court's inference of the right; to the contrary, Ely argues that the best textual and historical inference is that the ninth amendment was intended to make clear that unenumerated rights like constitutional privacy were to be enforceable against the federal government, in the same way that the privileges and immunities clause of Article IV contemplates a distinction between unenumerated fundamental and non-fundamental rights. John Hart Ely, Democracy and Distrust, Harvard University
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historical doubt that one such assumed basic human right was the natural right to marriage,[9] and there is quite good historical reason indeed to suppose that this right was thought of as one, non-exclusive example of a more abstract right of voluntary association.[10] Since these assumptions are appealed to by one or another of the clauses of the

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(footnote continued from previous page) Press: Cambridge, Mass., 1980, at pp. 34-41, 22-30.

[9] For example, Hutcheson's widely read and studied works list, among other fundamental human rights, "the natural right each one has to enter into the matrimonial relation with any one who consents," p. 299, Francis Hutcheson, A System of Moral Philosophy, [1755], Augustus M. Kelley, Publishers: New York, 1968.

[10] Striking evidence of this way of thinking appears in the lectures of John Witherspoon, a form of which James Madison heard and studied while a student at Princeton. Witherspoon, tracking Hutcheson's list of basic human rights, lists a "right to associate, if he so incline, with any person or persons, whom he can persuade (not force) -- under this is contained the right to marriage," John Witherspoon, Lectures on Moral Philosophy, Jack Scott, ed., Associated University Presses: Each Brunswick, N.J., 1982, at p. 123.

fourteenth amendment,[11] the Supreme Court quite properly has deployed interpretations of the abstract right of voluntary association in its elaboration of the first amendment guarantees of liberty of religion and speech, understood as protecting, inter alia, rights to associate for various religious, political, philosophical, and other purposes.[12] For the same reasons, the Court has properly elaborated as well a right to constitutional privacy originating precisely in the right to marriage historically understood as one central example of the more abstract right to association. Griswold. Consistent with the abstract nature of its background right, later cases have elaborated the right beyond inti-

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[11] Ely puts particular weight here on the privileges and clause of the fourteenth amendment, which, he believes, importantly incorporates the idea of unenumerated fundamental rights from the privileges and immunities clause of Article IV. See J. H. Ely, op. cit., pp. 22-30. The Supreme Court, of course, has placed the inference of unenumerated rights on the due process clause of the fourteenth amendment. See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

[12] See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Shelton v. Tucker, 364 U.S. 479 (1960).

mate relations in marriage. Eisenstadt v. Baird; Stanley v. Georgia; Roe v. Wade.

The principle of these cases rests on the vindication of a right of intimate association the coercive prohibition of which by state laws cannot satisfy their constitutionally required burden of justification.[13] In Griswold, for example, the state prohibition on the use of contraceptives in marriage limited the basic right of married couples to regulate the form of their sexual lives and their procreative consequences in forming new intimate relations with offspring. Such state prohibitions could not satisfy the constitutional burden of protecting the rights of other persons: on the contrary, legitimate state purposes of population control may thus be advanced. And, they could not reasonably be supposed to protect persons from self-destructive harms to self: in fact, contraceptive use in marriage has secured to couples the dignity of a deepened freedom and rationality of sexual expression in their intimate personal lives and greater control over their reproductive histories and other personal

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13 See, for example, Kenneth I. Karst, "The Freedom of Intimate Association," 89 Yale L.J., 624 (1980).

aims. Any residual justification of these laws appears, on constitutionally reflective examination, to be grounded in an ideal of the necessary link of sex and procreation which cannot satisfy the constitutionally neutral burden of justification to the many reasonable persons who do not share this ideal. If criminal prohibitions on use of contraceptives, abortion services, and of obscene materials in the home must be subjected to such exacting constitutional scrutiny, criminal statutes forbidding forms of sexual intimacy (oral and anal sex, in particular) deserve no less. Amici submit that the best contemporary evidence about the nature and role of sexuality in the life of the person makes clear the rightful dignity, grounded in the traditional American commitment to an abstract right of voluntary association, of the right of persons to engage in forms of sexual expression central to the integrity of their intimate relations and personal lives.[14]

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[14] The pervasive imaginative force of human sexuality in the life of the person, in contrast to the procreational periodicity of animal sexuality, is at the heart of Freud's central innovations in modern thought. See S. Freud, "'Civilized' Sexual Morality and Modern Nervous Illness," 9 The Complete Psychological

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In particular, criminalization of forms of oral and anal sex coercively abridges this fundamental right of three significant groups of persons: (1) many heterosexual men and women; (2) certain disabled people; and (3) homosexual men and women.

(1) Heterosexual men and women. The classic Kinsey and later studies make clear that large and growing numbers of heterosexual women and men regard forms of oral and anal sex as important options of sexual fulfillment central to the integrity of their intimate relationships.[15] Indeed, professional thera-

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(footnote continued from previous page) Works of Sigmund Freud, 181, 187 (standard ed. 1908), Hogarth Press: London, 1959. For important confirmation of comparative ethology and anthropology, see C. D. Ford & F. A. Beach, Patterns of Sexual Behavior, Harper, 1951, at pp. 199-267.

[15] The early Kinsey studies found, for example, that 15% of high school educated men engaged in cunnilingus or experienced fellatio in marriage, and 45% of college educated men engaged in cunnilingus and 43% experienced fellatio (A. C. Kinsey, et al., Sexual Behavior in the Human Male, W. B. Saunders: Philadelphia, 1948, p. 371), and that 50% and 46% of high school educated women experienced cunnilingus or engaged in fellatio, respectively, in marriage, and 58% and 52% of college educated women, respectively (A. C. Kinsey, et

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pies for sexual dysfunction include today, if the couple wishes, oral and anal sex techniques to enhance the mutual pleasure of the sexual experience.[16]

(footnote continued from previous page) al., Sexual Behavior in the Human Female, W. B. Saunders: Phil., 1953, p. 399). By 1974, 56% and 54% of high school educated men engaged in cunnilingus and fellatio, respectively, in their marriages; and 66% and 61% of college educated men, respectively; 58% and 52% of high school educated women engaged in cunnilingus and fellatio, respectively in marriage; and 72% of college educated women engaged in both. M. Hunt, Sexual Behavior in the 1970's, Playboy Press: Chicago, 1974, at p. 198. By 1983, the percentages of heterosexual couples reporting fellatio were as follows: 5% every time they had sex, 24% usually, 43% sometimes, 18% rarely, 10% never; the percentage reporting cunnilingus were: 6% every time, 26% usually, 42% sometimes, 19% rarely, 7% never. P. Blumstein & P. Schwartz, American Couples, Morrow: N.Y., 1983, at p. 236. In the same study, heterosexual men who receive oral sex are happier with their relationships in general (id., pp. 231-233); women report no comparable increment (id., pp. 233-237). The Kinsey studies found heterosexual anal sex quite infrequent (Kinsey, 1948, p. 579; P. H. Gebhard & A. B. Johnson, The Kinsey Data, Saunders: Phil., 1979, at pp. 304, 383). By 1974, half of the younger married respondents reported finding forms of it acceptable in love. M. Hunt, op. cit., pp. 199-200. Other, more informally gathered samples confirm all these trends in the data. See, e.g., S. Hite, The Hite

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(2) Disabled People. In working with persons whose sexual function is significantly altered by illness or disability, rehabilitation counselors, nurses, doctors, social workers, and others discuss and teach about sexual techniques as part of patient education. In the absence of capacity for erection of the penis or in view of limitations in body movement, oral sex is a primary, sometimes exclusive way for many couples to experience continued sexual expression.[17] Such forms of disability include arthritis and other mobil-

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(footnote continued from previous page) Report, Macmillan: N.Y., 1976; A. Pietropinto & J. Simenauer, Beyond the Male Myth, Times Books: N.Y., 1977; C. Tavris & S. Sadd, Redbook Report on Female Sexuality, Delacorte: N.Y., 1975; S. Hite, Hite Report on Male Sexuality, Ballantine: N.Y., 1981; L. Wolfe, Cosmo Report, Arbor House: N.Y., 1981.

[16] See, in general, L. Barbach, Women Discover Orgasm, Free Press: N.Y., 1980; H. S. Kaplan, The New Sex Therapy, Brunner/Mazel: N.Y., 1974; W. H. Masters & V. Johnson, Human Sexual Inadequacy, Little, Brown: Boston, 1970; J. & L. LoPiccolo, ed., Handbook of Sex Therapy, Plenum: N.Y., 1978.

[17] See the references cited at note 16, supra. See also A. Comfort, More Joy, Simon & Schuster: N.Y., 1975, pp. 210-213.

ity problems,[18] multiple sclerosis,[19] spinal cord injury resulting in paraplegia and quadriplegia and known side effects from medication,[20] diabetic disabilities,[21] cancer surgery in the vaginal area,[22] cardiac disabilities,[23] etc.

(3) Homosexual men and women. Intimate relationships of homosexual women and men

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18 M. Diamond & A. Karlen, Sexual Decisions, Little, Brown: Boston, 1980, p. 140; Jo-An Boggs, Living and Loving with Arthritis, Arthritis Center of Hawaii: Honolulu, 1978.

19 M. Barrett, Sexuality and Multiple Sclerosis, Multiple Sclerosis Society of Canada: Toronto, 1982, pp. 20-22.

20 T. O. Mooney, T. M. Cole, & R. A. Chilgren, Sexual Options for Paraplegics and Quadriplegics, Little, Brown: Boston, 1975, pp. 73-83; N. F. Woods, Human Sexuality in Health and Illness, 2d ed., C. V. Mosby: St. Louis, 1979, at pp. 358-359.

21 S. A. Kaufman, Sexual Sabotage, Macmillan: N.Y., 1981, p. 134.

22 M. E. Clark & J. Magrina, Sexual Adjustment to Cancer Surgery in the Vaginal Area, University of Kansas Medical Center: Kansas City, 1983, pp. 36-39; also, brochure appendix thereto, pp. 1-12.

23 R. M. Hogan, Human Sexuality, Appleton-Century-Crofts: N.Y., 1980, p. 638; S. Cambre, The Sensuous Heart, Pritchett & Hull: Atlanta, 1978, p. 13.

include oral sex as a primary option, and, for homosexual men, anal sex as well.[24]

Criminalization of all these forms of sexual expression abridges, accordingly, important, exclusive, or primary ways in which many persons in our society naturally feel and express sexual love for one another, voluntarily bond their lives to one another in the intimate relations central to the integrity of their personal lives, and, indeed, sustain, with the assistance of health professionals,[25] the sexual expression of their personal relationships. Amici wish to underscore the continuities in both the sexual experience and bonding which characterize the place these forms of sexual expression enjoy in the lives of diverse American couples today, facts attested by the many careful studies which

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[24] See, for example, A. P. Bell & M. S. Weinberg, Homosexualities, Simon & Schuster: New York, 1978, pp. 106-115; P. Blumstein & Schwartz, op. cit., pp. 237-245.

[25] In addition to the works cited at notes 16 to 23, the range of professional journals dealing with these issues include the following: Archives of Sexual Behavior, Journal of Sex and Marital Therapy, Journal of Sex Education and Therapy, Journal of Sex Research, Medical Aspects of Human Sexuality, Sexual Medicine Today, and Sexuality and Disability.

have followed in the wake of Kinsey's classic studies.[26] It would blink reality, in this case facts bearing on fundamental constitutional rights, not to give them appropriate weight in elaborating the meaning of abstract background rights today in the constitutionally sensitive area of criminal coercion. The attempt by law to isolate and criminally condemn such forms of sexual expression violently deracinates such acts from the lives of the many persons for whom such acts express the meaning for them of their most profound and personally authentic feelings of affection, attachment, and mutual love. This brutal and callous impersonal manipulation by the state of intimate personal life is the same constitutional evil as that condemned by the Court in disallowing the legitimacy of state control of contraceptive use in sexuality or state control of women's use of their bodies for procreation. Such coercive laws

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[26] For the continuities in the nature of sexual experience, see, especially, W. H. Masters & V. E. Johnson, Homosexuality in Perspective, Little, Brown: Boston, 1979. For continuities in both sexual experience and bonding, see P. Blumstein & P. Schwartz, American Couples, Morrow: New York, 1983.

must satisfy a heavy burden of constitutional justification; they cannot do so.

II.

CRIMINAL PROHIBITIONS ON FORMS OF SEXUAL EXPRESSION LIKE THOSE STRUCK DOWN IN ONOFRE CANNOT SATISFY THE CONSTITUTIONAL BURDEN OF JUSTIFICATION REQUIRED TO ABRIDGE CHOICES PROTECTED BY THE CONSTITUTIONAL RIGHT TO PRIVACY.

Criminal prohibitions bearing on the right of constitutional privacy require a heavy burden of justification, which can, in principle, be met. There would, amici assume, be no constitutional objection to the application of neutral criminal statutes to intra-familial murders, or wife or husband beatings, or child abuse, no matter how rooted in intimate family life and sexuality; nor should there be any objection to rape laws if applicable to married or unmarried sexual intimacies. In these cases, the constitutional burden of justification is met: countervailing rights of persons justify coercive interference into intimate relations. On the other hand, criminal prohibitions on use of contraceptives or abortion services or use of obscene materials in the home could not meet the burden of justification: arguments of count-

ervailing rights were either too constitutionally non-neutral or controversial or speculative to satisfy the burden required to abridge such intimately personal sexual matters. Criminal prohibitions on forms of sexual expression, clearly protected by constitutional privacy, satisfy this burden, if anything, less well.

The elaboration of the right to constitutional privacy in our law requires, for its intelligibility, a distinction between forms of reflective ethical argument which satisfy the constitutional burden required for its abridgement and other forms of argument which cannot meet this burden. Amici suggest that the relevant ethical approach, on which the privacy cases implicitly depend, is the abstract ethical perspective fundamental to Western conceptions of moral relations and specific to the commitment of American constitutionalism to respect for human rights, namely, treating other persons as one would oneself want to be treated, as a person with respect for one's basic demands for those liberties central to a free and self-governing person and moral agent.[27] Such equal respect

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[27] See John Rawls, A Theory of Justice,
(footnote continued)

for persons, which insures the basic liberties to form different religious, philosophical, and political allegiances, requires that the scope of the criminal law must itself express such respect for persons, in particular, by the protection and vindication of the claims of persons for the neutral goods all would require to lead their lives as free persons, irrespective of other ideological differences in basic religious or other commitments. Accordingly, the state may justly enforce criminal statutes which enforce ethical principles that, on fair terms to all, protect the interests of adult persons in life, bodily security and integrity, security in institutional relationships and claims arising therefrom, etc. and may protect as well the rights of children for appropriate conditions of nurture and development.

(footnote continued from previous page) Harvard University Press, 1971. The author of this brief has developed the ethical argument here deployed at much greater length in their application to the criminalization of consensual deviant sex in several articles. See Richards, "Sexual Autonomy and the Constitutional Right to Privacy," 30 Hastings L.J., 957 (1979); and, "Unnatural Acts and the Constitutional Right to Privacy," 45 Ford. L. Rev., 1281 (1977).

Certainly, such ethical principles dictate certain prohibitions and regulations of sexual conduct. For example, respect for the developmental rights of immature children would require that various rights, guaranteed to adults, not extend to persons lacking such rational capacities, such as children. Nor is there any objection to the reasonable and neutral regulation of obtrusive sexual solicitation as such or, of course, to forcible forms of intercourse of any kind. In addition, forms of sexual expression would be limited by other ethical principles: principles of not killing, harming or inflicting gratuitous cruelty (nonmaleficence); principles of paternalism in narrowly defined circumstances; and principles of fidelity.

Statutes that absolutely forbid oral and anal intercourse cannot be justified consistent with these principles. Such statutes are not limited to forcible or public forms of sexual intercourse, or sexual intercourse by or with children, but extend to private, consensual acts between adults as well.

The argument that such laws are justified by their indirect effect of stopping homosexual intercourse by or with the underaged as absurdly fails to meet the required constitu-

tional burden as the claim that absolute prohibitions on heterosexual intercourse could be thus justified. There is no reason to believe that homosexuals as a class are any more involved in offenses with the young than heterosexuals.[28] Nor is there any reliable evidence that such laws inhibit children from being naturally homosexual who would otherwise be naturally heterosexual. Sexual preference is settled, largely irreversibly[29] and as a

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[28] See the classic Kinsey Institute study of sex offenders, P. H. Gebhard, et al., Sex Offenders, Bantam: N.Y., 1965; M. Hoffman, The Gay World, Bantam: N.Y., 1968, at pp. 89-92. In general, seduction of the young appears to be more centered on heterosexual rather than homosexual relations. See A. Bell & M. Weinberg, op. cit., p. 230. Importantly, the failure to note the distinction between homosexuality and pedophilia is deplored by the majority of homosexual people who "do not share, do not approve, and fear to be associated with pedophiliac interests," D. J. West, Homosexuality, Aldine: Chicago, 1968, p. 119. One recent study summarizes the pertinent empirical literature on sex offenders against children as follows: "these men are much more likely to have a heterosexual history and orientation than a homosexual one. Contrary to public belief, homosexual adult males rarely molest young male children." R. L. Geiser, Hidden Victims: The Sexual Abuse of Children, Beacon Press: Boston, 1979, p. 75.

[29] See Wainwright Churchill, Homosexual

(footnote continued)

small minority preference,[30] in very early childhood, well before laws of this kind have any effect.[31] If the aim of determining sexual preference by criminal penalty were legitimate, which amici do not concede,[32] that interest could not constitutionally be secured by overbroad statutes which coercively violate the core privacy rights of exclusive homosex-

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(footnote continued from previous page) Behavior Among Males, Hawthorn: New York, 1967, pp. 283-291; C. Tripp, The Homosexual Matrix, McGraw-Hill: N.Y., 1975, p. 251; D. J. West, Homosexuality, Aldine: Chicago, 1968, p. 266.

30 Kinsey states that four percent of males are exclusively homosexual throughout their lives. Kinsey, et al., op. cit., 1948, pp. 650-651.

31 See, for example, J. Money & H. Ehrhardt, Man & Woman Boy & Girl, Johns Hopkins University Press: Baltimore, 1972, at pp. 153-201. One study hypothesizes that gender identity and sexual object choice coincide with the development of language, i.e., from 18 to 24 months of age. See Money, Hampson & Hampson, "An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism," 97 Bull. Johns Hopkins Hosp. 301 (1955). Cf. A. P. Bell, M. S. Weinberg, & S. K. Hammersmith, Sexual Preference, Indiana University Press: Bloomington, 1981.

32 See Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923).

uals of all ages and that, in any event, irrationally pursue the state interest.

Other moral principles fail to justify absolute prohibitions on oral and anal sex. Such relations are not, for example, generally violent. Thus, prohibitory statutes could not be justified by moral principles of nonmaleficence. There is no convincing evidence that such sexual acts harm the agent or correspond with any form of mental or physical disease or defect[33] so that paternalistic principles do not here come into proper play. And, these statutes do not correspond to any just purpose the state might have in enforcing principles of fidelity: the acts often occur in ongoing and longstanding intimate relations, which they may, if anything, stabilize and enrich.

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33 See The Wolfenden Report, Stein & Day: New York, 1963, at pp. 31-33; E. Hooker, "The Adjustment of the Male Overt Homosexual," 21 J. of Projective Techniques 18 (1957). Both the American Psychiatric Association and the American Psychological Association no longer regard homosexuality as such as a manifestation of psychological problems. P. Blumstein & P. Schwartz, op. cit., p. 44. For the ways in which criminalization, if anything, fosters health problems in this area, see Note, "The Constitutionality of Laws Forbidding Private Homosexual Conduct," 72 Mich. L. Rev. 1613, 1631-33 (1974).

The failure of these laws to satisfy the constitutional burden required for abridgement of constitutional privacy is consistent with the similar failure implicit in the Court's previous applications of constitutional privacy. Like anti-contraception laws, these laws coerce people not to engage in nonprocreative sex but do so even more unwarrantably since some disabled persons and many homosexual men and women find their exclusive or primary forms of sexual expression in these acts. The interest in autonomy in intimate relations is here at least as strong as that in the reproductive autonomy of abortion decisions or decisions to use obscene materials, and the evidence of harms to the rights of concrete other persons even more controversial and speculative.

III.

RESIDUAL MORAL ARGUMENTS, TRADITIONALLY OFFERRED TO JUSTIFY CRIMINALIZATION OF ORAL AND ANAL SEX, REFLECT A HISTORY OF FALSE EMPIRICAL AND DUBIOUS NORMATIVE BELIEFS THAT CAN NO LONGER CONSTITUTIONALLY ENJOY THE FORCE OF LAW.

One final moral argument has been used to justify a general prohibition on oral and anal sex -- the argument invoked by the district

court in Doe as the ultimate ground for the legitimacy of the Virginia sodomy statute, namely, "the promotion of morality and decency," 403 F. Supp. 1202, interpreted as an appeal to traditional moral condemnation of certain acts.

Amici argued in II., supra, that a form of ethical argument is, indeed, necessary to the legitimacy of the criminal law in the United States, but the very elaboration of the constitutional right to privacy consistent with fundamental principles of our constitutional law suggests that not every statement of "morality and decency," which surely could be invoked against all the privacy decisions, is of equal constitutional weight. In fact, all the privacy decisions reflect deep moral controversy within American society over which aspects of our collective moral traditions can and cannot justly be retained. Our moral practices as a community are not inextricably homogeneous: on critical reflection, we retain certain basic principles in them (for example, treating persons as equals), but change lower order conventions which we come to believe inconsistent with the reflective ethical core of our moral and constitutional values. Accordingly, the appeal to "morality

and decency," without more, falsely begs the central issue in dispute, supposing precisely the kind of homogeneity in moral values which the general history of Western ethics and specific history of constitutional privacy belie. It is a valued and admirable distinction of Western ethics and law that they have changed, open to critical reflection on their own history and to new empirical and normative perspectives.

Amici proposed in II., supra, the kind of ethical principles to which controversies over proper criminalization appeal, and explained why the criminalization of acts of sexual expression cannot meet this burden of justification. We propose now to complete that argument by showing that the traditional moral conceptions underlying the criminalization of oral and anal sex reflect a history of false empirical and dubious moral beliefs that cannot, on reflection, constitutionally enjoy the force of law.

The traditional moral condemnation of oral and anal sex in our culture may be traced to a number of beliefs: (1) that homosexual forms of such sexual expression undermine, particularly in men, desirable masculine character traits -- for example, courage and

self-control; (2) a general conception that sexuality has one proper purpose alone (procreation) and any other form of sexual expression, disengaged from procreation, is shamefully wrong (including contraceptive use); (3) an empirical belief that prohibitions of homosexual forms of such sexual expression combatted pestilence, plague, and natural disaster;[34] (4) a theological conception that relevant passages in the Old and New Testaments condemned such acts; (5) various empirical beliefs about the inhumanly exceptional choice of sexual propensities, the evil consequences of their exercise to the agent and others (child molestation), their connections with other moral vices, etc.; and (6) a poli-

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[34] See Justinian, Novellae 77 and 141, reprinted in D. Bailey, Homosexuality and the Western Christian Tradition, Longmans, Green & Co.: New York & London, at pp. 73-75. The issuance of these imperial edicts seems to have been prompted by contemporary earthquakes, floods, and plagues, which Justinian, drawing an analogy to the Sodom and Gomorrah episode, supposed to be caused by homosexual practices. Id. at pp. 76-77. Blackstone similarly cites the Sodom and Gomorrah episode, in support of the appropriateness of the death penalty for homosexual acts, indeed suggesting -- since God there punished by fire -- the special appropriateness of death by burning. 4 W. Blackstone, Commentaries *216.

tical conception that such acts constitute a form of willful heresy or treason against the stability of social institutions. None of these beliefs can today reasonably sustain the application of coercive sanctions to oral and anal sex as such.

(1) The view that male homosexuality necessarily involves the loss of desirable character traits[35] is without empirical foundation: in general, apart from sexual preference, exclusive homosexuals are indistinguishable from the general population.[36] If the traditional view rests on the idea that sexual relations between males involve the degradation of one or both parties to the status of a woman,[37] the view expresses intellectual confusion (sexual preference and gender iden-

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35 For the earliest literate statement of this view, see Plato, Laws, Book VIII, 835d-842a.

36 See A. Bell & M. Weinberg, Homosexualities, at pp. 195-231; W. Churchill, Homosexual Behavior Among Males, pp. 36-59.

37 In the ancient world, for example, while homosexuality as such was not wrong, to allow oneself to be the passive partner (the woman) was wrong. See T. Vanggaard, Phallos, International Universities Press: New York, 1972.

tity are not correlated)[38] and the unacceptable moral premise that the status of a woman is a degradation, something repugnant both to contemporary constitutional law and ethics.[39]

(2) The general conception that sexuality has one exclusively legitimate function (procreation)[40] is one almost certainly based

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[38] See, e.g., W. Simon & J. H. Gagnon, "Femininity in the Lesbian Community," in E. Goode & R. Troiden, eds., Sexual Deviance and Sexual Deviants, Morrow, New York, 1974, at pp. 256-67.

[39] See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); J. S. Mill, The Subjection of Women, MIT Press: Cambridge, Mass., 1970.

[40] The classic statement of this view is Augustine, The City of God, H. Bettenson trans. Penguin: Harmondsworth, 1972, at pp. 577-94. St. Thomas is in accord with Augustine's view. Of the emission of semen apart from procreation in marriage, he wrote: "[A]fter the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded." T. Aquinas, On the Truth of the Catholic Faith: Summa Contra Gentiles, pt. 2, ch. 122(9), V. Bourke trans. Image: New York, 1956, at p. 146. See, in general, John T. Noonan, Jr., Contraception: A History of Its Treatment by the Catholic Theologians and Canonists, Harvard University Press: Cambridge, Mass., 1966; Vern Bullough, Sexual Variance in Society and History, University of Chicago Press: Chicago, 1980.

on a misunderstanding of the unique features of human sexuality, its expression of higher cortical functions of imagination and bonding and its independence of the reproductive cycle.[41] For humans, sexual relations are intrinsically valuable in the expression of love and bonding and the forms of intimate relations and personal lives they make possible.[42] The insistence that sex must be procreational appears, from the perspective of individuals, to be a moral degradation and denial of valuable capacities of human nature, and, from the viewpoint of society, most unwise in a period of increasing concern with population control. Both these considerations justify the Court's rejection of anti-contraception laws and apply as well to nonprocreational sex acts as such.[43]

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41 See C. Ford & F. Beach, Patterns of Sexual Behavior, at pp. 199-267; H. S. Kaplan, op. cit.

42 See I. Eibl-Eibesfeldt, Love and Hate, G. Strachan trans. Holt, Rinehart & Winston: New York, 1972, at pp. 155-169; W. Masters & V. Johnson, The Pleasure Bond, Little, Brown: Boston, 1975.

43 Certainly, the crude argument that if everyone were homosexual there would, disastrously, be an end of the human species,

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(3) Empirical beliefs about the causal connection of oral and anal sex to natural disasters are, of course, without foundation, and would not be worthy of mention were they not cited by influential Western legal authorities as the reason for condemning homosexuality as a capital offense, preferably by burning.[44]

(4) Many of the interpretations of the Bible, to the effect that homosexual relations are condemned, are almost certainly erroneous.[45] Other forms of moral argument to the

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(footnote continued from previous page) universalizes absurdly a principle no one seriously proposes: namely, that everyone should or must be homosexual, as if, contrary to all modern sex research, sexual preference is or could be chosen.

[44] See note 34, supra.

[45] For example, the Sodom and Gomorrah episode, Genesis 19, is apparently not about homosexuality at all, but hospitality. See D. Bailey, op. cit., pp. 1-28; J. McNeill, The Church and the Homosexual, Sheed, Andrews & McMeel: Kansas City, 1976, at pp. 42-50; J. Boswell, Christianity, Social Tolerance, and Homosexuality, University of Chicago Press: Chicago, 1980, pp. 91-105. Yet, American courts cite this episode in support of the legitimacy of anti-sodomy laws, Dawson v. Vance, 329 F. Supp. 1320, 1322 (S.D. Tex. 1972). See Doe v. Commonwealth's Attorney, (footnote continued)

same effect, by prominent theologians,[46] clearly reflect forms of beliefs (1) and (2), which were absorbed from the surrounding culture and read into Western theology. Indeed, critical reflection on these beliefs has led many religious people to question their continuing religious authority.[47] Certainly, if these beliefs cannot sustain reflective scrutiny, their religious origins cannot confer on them constitutional legitimacy; indeed, a powerful argument could be made to quite the opposite effect.[48]

(5) Traditional conceptions of the willful, mysteriously anomalous, inhumanly exceptional, and harmful nature of homosexual preference to the agent and others cannot

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(footnote continued from previous page) 403 F. Supp. 1199 (E.D. Va. 1975), aff'd without opinion, 425 U.S. 901 (1976), which points out that sodomy statutes have an "ancestry going back to Judaic and Christian law," id. at 1202.

46 See Augustine, op. cit., and Thomas Aquinas, op. cit.

47 See works of D. Bailey, J. McNeill, and J. Boswell, op. cit.

48 Louis Henkin, "Morals and the Constitution: The Sin of Obscentiy," 63 Colum. L. Rev. 391 (1961).

withstand empirical examination today. Homosexual preference appears to be an adaptation of natural human propensities to very early social circumstances of certain kinds, so that the preference is settled, largely irreversibly, at a quite early age.[49] The sexual acts which express this preference for homosexuals are a natural expression of human sexual competences and sensitivities, and do not reflect any form of damage, decline, or injury to self.[50] For homosexuals, these acts are at the core of intimate relationships as central to their integrity as comparable intimate relationships of others.[51] Aside from sexual preference, homosexuals are indistinguishable from the rest of the population, being no more likely to have sex with the underage than other groups.[52]

(6) The conception that homosexual forms of oral and anal sex are a form of heresy or treason is both an ancient and modern ground

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[49] See references at note 31, supra.

[50] See references at note 33, supra.

[51] See P. Blumstein & P. Schwartz, op. cit., pp. 44-45.

[52] See references at note 28 and note 36, supra.

offerred for its criminal condemnation.[53] But, there is no good reason to believe that the legitimacy of such forms of sexual expression destabilizes social cooperation. Homosexual relations are and will foreseeably remain the preference of small minorities of the population,[54] who are as committed to

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[53] Throughout the Middle Ages, homosexuals were prosecuted as heretics, often being burned at the stake. See D. Bailey, op. cit., p. 135. Thus, "buggery," one of the names for homosexual acts, derives from a corruption of the name of one heretical group alleged to engage in homosexual practices. See Bailey, id., at pp. 141, 148-49. For a modern use of the idea of treason in this context, see P. Devlin, The Enforcement of Morals, Oxford University Press: London, 1965, at pp. 1-25. For rebuttal, see H. L. A. Hart, Law, Liberty, and Morality, Stanford University Press: Stanford, 1963; also, "Social Solidarity and the Enforcement of Morals," 35 U. Chi. L. Rev., 1 (1967).

[54] The original Kinsey estimate that about 4 percent of males are exclusively homosexual throughout their lives is confirmed by comparable European studies. See Paul H. Gebhard, "Incidence of Overt Homosexuality in the United States and Western Europe," J. M. Livingood, ed., National Institute of Mental Health Task Force on Homosexuality, U.S. Government Printing Office: Washington, D.C., 1972, at pp. 22-29. The incidence figure remains stable though many of the European countries do not apply the criminal penalty to

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principles of social cooperation and contribution as any other group in society at large. Indeed, the very accusation of heresy or treason brings out an important feature of the traditional moral condemnation in its contemporary vestments: it rests no longer on generally acceptable arguments of protection of the rights of persons to neutral goods, but appeals to arguments internal to highly personal, often almost religious decisions about acceptable ways of belief and life style. When a moral tradition in this way abandons certain of its essential grounds, it may justly retain its legitimacy for those internal to the tradition, all the more so because it remains more exclusively constitutive of their tradition. But, if those essential grounds are constitutionally necessary for the tradition coercively to enforce its mandates through the criminal law, the abandonment of those grounds, must, pari passu, deprive the tradition of its constitutional legitimacy as a ground for coercive sanctions. For the

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(footnote continued from previous page) consensual adult sex acts of the kind here under discussion. See W. Barnett, Sexual Freedom and the Constitution, University of New Mexico Press: Albuquerque, 1973, at p. 293.

tradition now no longer expresses ethical arguments which may fairly be imposed on all persons, but rather perspectives reasonably authoritative only for those internal to the tradition. Enforcement of such perspectives would be, amici submit, the functional equivalent of a heresy prosecution[55]: the grounds for prohibition are highly personal ideological or political disagreements among which free persons reasonably disagree; and the continuing force of the prohibitions rests, on examination, not on protection of the rights of persons, but on fears and misunderstandings directed at the alien way of life of a small and traditionally condemned minority, as if, at bottom, the legitimacy of one's own way of life requires the illegitimacy of all others. Constitutional toleration, that forbids heresy prosecutions[56] and sharply circumscribes

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55 The English legal scholar, Tony Honore, observed of the contemporary status of the homosexual: "It is not primarily a matter of breaking rules but of dissenting attitudes. It resembles political or religious dissent, being an atheist in Catholic Ireland or a dissident in Soviet Russia." Tony Honore, Sex Law, Duckworth: London, 1978, at p. 89.

56 "Heresy trials are foreign to our Constitution," United States v. Ballard, 322 U.S. 78,

(footnote continued)

treason prosecutions[57], must likewise be extended to criminal prohibitions which today have the political force of heresy and treason prosecutions.

IV.

THE CRIMINALIZATION OF SEXUAL EXPRESSION NOT ONLY FAILS TO SATISFY ITS CONSTITUTIONAL BURDEN OF JUSTIFICATION AND RESTS ON ERRONEOUS BELIEFS, BUT INFLICTS GRIEVOUS HARM ON PERSONS.

Amici submit that the arguments here made make possible for us as a legal culture the coherent elaboration of continuous constitutional traditions consistent with contemporary empirical and normative insight. For example, the deep commitment of the Founders to the abstract background right of voluntary association should now reasonably be extended to forms of intimate association which can no longer be supposed beyond the purview of ethics. Indeed, amici believe that laws criminalizing such intimate associations brutally and unethically work grievous harm in

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(footnote continued from previous page) 86 (1944) (Douglas, J., writing for the Court).

57 See U.S. Const., Article III, Sec. 3.

areas of personal intimacy at the core of the ethical self-respect which the right to constitutional privacy justly protects: health professionals are legally restricted from assisting people to responsible sexual fulfillment, and the force of criminal law callously bears upon intimate sensitivities at the core of relationships and aspirations that give meaning to life itself.

Consider the effect of these laws on the lives of disabled people and exclusively homosexual men and women: their cumulative effect is to deny disabled people and practicing homosexuals the experience of a secure self-respect in building personal relationships. The degree of emotional sacrifice thus exacted for no defensible reason seems among the most unjust deprivations that law can compel. Persons are deprived of a realistic basis for confidence and security in their most basic emotional propensities. Criminal penalties reinforce employment risks and social prejudice, which fragment emotions, physical expression, and self-image in a cruelly gratuitous way. The deepest damage is to the spiritual and imaginative dimension that gives human sexual love its extraordinary significance in a life well lived. Persons

surrounded by false social stereotypes that are supported by law find it difficult to esteem their own emotional propensities, their natural expression, or their objects. Without such self-esteem, love finds only with difficulty a meaningful and enduring object. In thus forbidding sexually disabled persons and exclusive homosexuals the option to express sexual love in the only ways they often find natural, the law deprives them of nothing less than love, an essential good of our socially companionate species. Amici regard this as a grievous harm to the spiritual lives of the good and innocent persons who deserve more of their constitutional traditions than such unjust contempt. We submit that our law affords a remedy for this wrong, and ask this Court to give it.

CONCLUSION

Since, for reasons stated above, the constitutional right to privacy encompasses acts of intimate sexual expression, solicitation laws, which non-neutrally regulate access

to such a right, cannot be sustained. Accordingly, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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